MAUNG MIN AUNG & ANOR

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 41-69 & 70 - 2000]
13 NOVEMBER 2000

CRIMINAL PROCEDURE: *Conviction - Validity of conviction - Recording of conviction after plea in mitigation and prior to imposition of sentence - Whether proper in law - Charges - Irregularity - Not read to accused persons individually - Whether curable under s. 422 Criminal Procedure Code*

In this instance, the appellants urged the court to exercise its powers of revision to review the convictions recorded by the learned magistrate against them. The learned magistrate had convicted them after they had made their plea in mitigation and prior to the imposition of sentence. That, according to the appellants, was wrong in law as a conviction referred to a finding of guilt and it must therefore be recorded upon acceptance of the plea of guilt and thus, before the plea in mitigation was made. Apart from that, the appellants alleged that the charges were not read to them individually.

Held:

[1] A conviction must be recorded only after the court is satisfied that the sentence to be imposed warrants a conviction. The court can be so satisfied only after a plea in mitigation has been advanced in order to assess the sentence to be passed. Thus, a conviction must be recorded only after the plea in mitigation has been made and before sentence is passed.

[1a] Any conviction recorded before a plea in mitigation may render nugatory the application of s. 173A of the Criminal Procedure Code ('CPC') which provides for certain orders to be made without recording a conviction. What has been made in mitigation may warrant the making of such orders which would be hampered if a conviction has already been recorded.

[1b] The procedure followed by the learned magistrate was correct in law. Any error in recording a conviction was an irregularity which was curable unless the pre-mature recording precludes the imposition of a sentence without recording a conviction.

[2] The relevant part of the notes of evidence of the learned magistrate did not indicate that the charges against the two accused persons were read to them separately. On the contrary it indicated that the plea was a joint plea of guilty. The accused persons had therefore not pleaded guilty in accordance with the law. Those irregularities were not curable under s. 422 CPC.

[Convictions and sentences set aside; accused persons ordered to be retried.]

Case(s) referred to:
Abdul Kadir Abdul Rahman v. PP [1984] 1 MLJ 80 ***(refd)***
Chen Chong & Ors v. PP [1967] 2 MLJ 130 ***(refd)***
Chin Ban Keat v. R [1949] MLJ 297 ***(refd)***
Chota Abdul Razak v. PP [1991] 3 MLJ 77 ***(refd)***
Fong Siew Poh & Ors v. PP [1933] 1 MC 155 ***(refd)***
Griffiths v. R [1977] 137 CLR 293 ***(refd)***
Heng Kim Khoon v. PP [1972] 1 MLJ 30 ***(refd)***
Lian Kian Boon v. PP [1991] 1 MLJ 51 ***(refd)***
Lo Kim Peng & Ors v. PP [1978] 1 MLJ 249 ***(refd)***
Maxwell v. R [1996] 135 ALR 1 ***(refd)***
Mohammad Hassan v. PP [1998] 5 MLJ 65 ***(refd)***
PP v. Abdul Aziz [1978] 2 MLJ 155 ***(refd)***
PP v. He King Kiok & Anor [1992] 2 MLJ 781 ***(refd)***
PP v. Ismail Ibrahim [1998] 2 CLJ 213 ***(refd)***
R v. Boyle [1954] 2 All ER 721 ***(refd)***
R v. Tonks and Goss [1963] VR 121 ***(refd)***
Richards v. The Queen [1993] AC 217 ***(refd)***
S (An Infant) v. Recorder of Manchester [1970] 2 WLR 21 ***(refd)***
Sau Soon Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Subramaniam & Anor v. PP [1976] 1 MLJ 76 ***(refd)***
Tukiran Taib v. PP [1955] MLJ 24 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173A, 422

Magistrates' Courts Act 1952 [UK], s. 13(3)

For the appellants - S Bala; M/s SBS Maniam Assocs
For the respondent - Lukman Zainuddin

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul J:

Maung Min Aung and Abdul Razak bin Kamaruddin, Myanmar nationals, were jointly charged in the magistrates' court at Kuala Lumpur on 30 May 2000 with three offences under the Immigration Act 1959 and one under the Passports Act 1966. They pleaded guilty to the four charges against them and were sentenced to seven years' imprisonment and ordered to be given five strokes of the rotan each in respect of the first charge and three years' imprisonment in respect of the second, third and fourth charges. They appealed against the sentence imposed.

When the appeal came up for hearing before me, learned counsel for the accused invited me to exercise my powers of revision to review the convictions recorded by the learned magistrate against the two accused persons as they were wrong in law. He said that the convictions had been recorded improperly and that the charges were not read to the accused persons individually. As the matters raised were of considerable importance I agreed to review the convictions recorded.

Recording Of The Conviction

The learned magistrate had convicted both the accused persons after they had made their plea in mitigation and just prior to the imposition of sentence. This, according to learned counsel, is wrong in law as a conviction refers to a finding of guilt and it must therefore be recorded upon acceptance of the plea of guilt and, thus, before the plea in mitigation is made.

In order to consider the validity of the objection raised by learned counsel it is necessary to delve into the meaning of the word "conviction". The question of what constitutes a "conviction" has been the subject matter of deliberation in several cases. It has been used with two different meanings. Lord Reid said in *S (An Infant) v. Recorder of Manchester* [1970] 2 WLR 21 at p. 25:

> Much of the difficulty has arisen from the fact that 'conviction' is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt.

In *R v. Tonks and Goss* [1963] VR 121 the full court of the Supreme Court of Victoria (Herring CJ and Sholl and Little JJ) reviewed the authorities and said at pp. 127 – 128:

> The review of the authorities which we have made satisfied us that a plea of guilty does not of its own force constitute a conviction. In our opinion it amounts to no more than a solemn confession of the ingredients of the crime alleged. A conviction is a determination of guilt, and a determination of guilt

> must be the act of the court or the arm of the court charged with deciding the guilt of the accused. It may be that even a determination of guilt will not in all cases amount to a 'conviction', for the latter term may be used in a particular context as meaning not merely conviction by verdict where no judgment is given, but conviction by judgment (*vide, Burgess v. Boetefeur* [1844] 7 Mann & G 481 and *Hale's Pleas of the Crown*, Vol 1 p 686)' but there must at least be a determination of guilt before there can be a conviction. There can accordingly be no conviction on a count to which an accused pleads guilty until by some act on the part of the court it has indicated a determination of the question of guilt.

It is therefore clear that a plea of guilty does not of its own force constitute a conviction. It is a further act of the court that will result in one. Even then the word "conviction" is used in two senses; one in a narrow sense and the other in a wider sense. In the narrower sense a conviction does not occur until there is an acceptance of the plea of guilty which will amount to a determination of guilt by the court (see *Griffiths v. R* [1977] 137 CLR 293; *Maxwell v. R* [1996] 135 ALR 1). The acceptance of the plea by the court amounts to a determination of guilt because it means that the court is satisfied that the accused has pleaded guilty to an offence known to law with full appreciation of the nature and consequences of the plea. In the case of a trial the determination of guilt will be the finding of guilt made at the end of the case. Where the word "conviction" is used in this sense it will occur immediately upon acceptance of a plea of guilt or a finding of guilt by the court resulting in a conviction being recorded before the plea in mitigation has been made by the accused. But even a determination of guilt will not in all cases amount to a "conviction". Thus, in its wider sense it refers to the final disposal of the case. This will occur after the plea in mitigation has been made and a conviction will accordingly be recorded just before sentence is passed. The proper sense in which the word must be construed in a particular case is dependent on the statutory context in which it is used. Where there is nothing in the context to suggest the narrower sense in which it is used then it must be interpreted to refer to its wider meaning. This was succinctly explained by Lord Bridge of Harwich in *Richards v. The Queen* [1993] AC 217 at pp 222 – 223:

> It has been said many times that the word 'conviction' is ambiguous and it has sometimes been construed in a statutory context as referring to nothing more than a finding of guilt. But, in the absence of something in the context which suggests that narrower meaning, the authorities in the 19th century and earlier all seem to point to the conclusion that the requirement to establish a conviction requires a proof not only of the finding of guilt but also of the court's final adjudication by sentence or other order.

Thus it was held in *S (An Infant) v. Recorder of Manchester* [1970] 2 WLR 21 that s. 13(3) of the Magistrates' Courts Act 1952 which states that:

> If the accused pleads guilty, the court may convict him without hearing evidence

uses the word "conviction" in the narrower sense of referring to only a finding of guilt. The requirement in that provision to convict following a guilty plea without there being any intermediate step of making a determination of guilt means that it is the conviction which is the act that decides the guilt of the accused. It therefore refers to the determination of guilt and not to the final disposal of the case.

With that in mind I shall now consider the context in which the word "convicted" has been used in s. 173(b) and (m)(ii) of the Criminal Procedure Code ("s. 173(b)" and "s. 173(m)(ii)") in order to determine the sense in which it has been used therein. Section 173(b) deals with the procedure to be followed after a plea of guilt has been made while s. 173(m)(ii) deals with the procedure to be followed after a finding of guilt. Both the provisions read as follows:

> 173. The following procedure shall be observed by Magistrates in summary trials:
>
> b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:
>
> Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.
>
> (m) (ii) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it and the Court shall pass sentence according to law.

Pursuant to s. 173(m)(ii) the order that must be made at the end of the trial before sentence is imposed is a finding of guilt followed by a conviction on it, if found necessary. It is mandatory for the court to make a finding of guilt as indicated by the word "shall" in the phrase " … the court shall find the accused guilty … " while the recording of a conviction is discretionary as indicated by the word "may" in the phrase " … and he may be convicted on it … " in s. 173(m)(ii). The meaning of the word "convicted" in s. 173(m)(ii) depends on whether it refers to a determination of guilt or the final disposal of the case. As I said earlier a finding of guilt is a determination of guilt

and is capable of amounting to a "conviction" on its own within the meaning of the narrower sense in which the word is used. In order to fall within this meaning the word "convicted" in s. 173(m)(ii) must refer to a determination of guilt. However, the fact that the court shall find the accused guilty at the end of the trial " … and he may be convicted on it … " as provided by s. 173(m)(ii) means that the recording of a conviction is a separate and distinct exercise after a finding of guilt has already been made. The fact that the power to convict is not automatic following a finding of guilt, by virtue of it being discretionary, supports this view. The discretionary power to convict means that the recording of a conviction must be postponed after a finding of guilt has been made. It is postponed to enable the court to decide whether in fact a conviction must be recorded before imposing sentence. That will bring into focus s. 173A of the Criminal Procedure Code under which an order is made without recording a conviction. Thus a conviction must be recorded only after the court is satisfied that the sentence to be imposed warrants a conviction. The court can be so satisfied only after a plea in mitigation has been advanced in order to assess the sentence to be passed, that is to say, whether the sentence is one that must carry with it a conviction. The corollary is that a conviction cannot be recorded at the stage a finding of guilt is made. The word "convicted" in s. 173(m)(ii) thus refers to the wider sense of the meaning of the word "conviction" in which it is used which is the stage of the final disposal of the case. A conviction must therefore be recorded only after the plea in mitigation has been made and before sentence is passed. In cases falling within s. 173(b) the first order to be made by the court following a plea of guilt is the recording of the plea. The proviso to s. 173(b) ("the proviso") explains the steps to be taken before recording a plea of guilty. It must be observed that the record made of the accused pleading guilty when the charge is read and explained to him is not the recording of the plea as envisaged by the proviso. It is only the first step or the commencement of the recording of the plea to enable the court to proceed further so as to ensure that the plea made amounts to a plea of guilty in law in accordance with the requirements of the proviso. The proviso requires the court to ascertain

(a) that the accused understands the nature and consequences of his plea and that

(b) he intends to admit, without qualification, the offence alleged against him

The recording of the plea is therefore done in two further stages after the initial record has been made of the accused pleading guilty. The first stage consists of the court ascertaining that the accused understands the nature and consequences of the plea after they have been explained to him. This is done immediately when he pleads guilty. This stage of the recording of the plea is signified by the court's record stating that the accused understands the nature

and consequences of his plea. The second stage consists of the admission, without qualification, of the offence by the accused. In order to make such an admission the accused must know the nature of the offence alleged against him. He would only be able to do so if the facts that constitute the offence have been placed on record. Thus the prosecution must set out an outline of the facts of the case (see *PP v. He King Kiok & Anor* [1992] 2 MLJ 781; *Chota Abdul Razak v. PP* [1991] 3 MLJ 77; *Mohammad Hassan v. PP* [1998] 5 MLJ 65). The facts given should be confined to matters which the prosecution is able to prove and which are necessary to establish the charge (see *Chen Chong & Ors v. PP* [1967] 2 MLJ 130; *Abdul Kadir Abdul Rahman v. PP* [1984] 1 MLJ 80). The facts enable the court to satisfy itself that they constitute the offence to which the accused has pleaded guilty (see *Tukiran Taib v. PP* [1955] MLJ 24; *Chin Ban Keat v. R* [1949] MLJ 297; *PP v. Ismail Ibrahim* [1998] 3 MLJ 243). The requirement of the accused's admission of the offence alleged against him is satisfied by him admitting the facts that have been given. The court then accepts the guilty plea after the accused has admitted the facts (see *PP v. Abdul Aziz* [1978] 2 MLJ 155; *Lian Kian Boon v. PP* [1991] 1 MLJ 51). The court is not bound to accept a plea of guilt in all cases (see *Heng Kim Khoon v. PP* [1972] 1 MLJ 30). The plea should not be accepted by the Court where on the facts admitted an accused person could not in law have been guilty of an offence (see *Sau Soon Kim v. PP* [1975] 2 MLJ 134; *Lo Kim Peng & Ors v. PP* [1978] 1 MLJ 249). The recording of the plea at this stage is therefore signified by the admission of the facts by the accused and the acceptance of the plea by the court. Thus the recording of the plea as required by the proviso is complete only when the court has accepted the plea of guilt. It amounts to a determination of guilt. This, on its own, is capable of amounting to a conviction. However, just as in the case of s. 173(m)(ii), the recording of a conviction pursuant to s. 173(b) is a separate exercise after the plea has been recorded. The meaning of the word "convicted" in s. 173(b) is therefore the same as in s. 173(m)(ii). This interpretation of both the provisions is logical as any conviction recorded before a plea in mitigation has been made may render nugatory the application of s. 173A of the Criminal Procedure Code which provides for certain orders to be made without recording a conviction. What has been raised in mitigation may warrant the making of such orders which would be hampered if a conviction has already been recorded.

The procedure to be followed where there is a plea of guilt or a finding of guilt can thus be summarised as follows:

Section 173(b)

1. Charge must be read and explained to accused. Court must ensure that accused understands the charge.

2. Accused pleads guilty.

3. Recording of plea to commence.

4. Court must ensure that accused understands nature and consequences of his plea. First stage in recording plea.

5. Facts of the case to be recorded.

6. Court must ascertain that facts make out the offence.

7. Court must ascertain whether accused admits the facts.

8. If accused denies the facts, plea to be rejected and case to be fixed for trial.

9. If accused admits facts, plea to be accepted. Second stage in recording plea.

10. Plea in mitigation.

11. Recording of conviction (No recording of conviction if order to be made is one under s. 173A Criminal Procedure Code).

12. Sentence.

Section 173(m)(ii)

1. Charge must be read and explained to accused. Court must ensure that accused understands charge.

2. Accused claims trial.

3. Trial.

4. Finding of guilt.

5. Plea in mitigation.

6. Recording of conviction (No recording of conviction if order to be made is one under s. 173A Criminal Procedure Code).

7. Sentence.

I am therefore of the view that the procedure followed by the learned magistrate is correct in law. The objection raised is thus without any merit. I pause to add that any error in recording a conviction is an irregularity which is curable unless the pre-mature recording precludes the imposition of a sentence without recording a conviction.

Taking Of The Plea

Learned counsel contended that the record of proceedings does not disclose that the charges were read to both the accused persons separately. The relevant part of the notes of evidence of the learned magistrate merely reads as follows:

OKT: PBTF MS TSAP.

This note does not indicate that the charges against the two accused persons were read to them separately. On the contrary it indicates that the plea was a joint plea of guilty. In *Fong Siew Poh & Ors v. PP* [1933] 1 MC 155 it was held that a conviction based on a joint plea of guilty by two or more accused persons is bad and irregular. The note also does not show that the plea was taken in respect of the four charges separately. In *R v. Boyle* [1954] 2 All ER 721 it was held that where there are two or more charges against an accused person the charges should be read out and explained to him separately and the plea must be recorded separately on each charge. The accused persons have therefore not pleaded guilty in accordance with law. These irregularities are not curable under s. 422 of the Criminal Procedure Code (see *Subramaniam & Anor v. PP* [1976] 1 MLJ 76). It follows that the convictions recorded against the two accused persons and the sentences imposed must be set aside.

In the exercise of my powers of revision I set aside the convictions and sentences imposed upon the two accused persons and ordered that they be retried.